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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941

No. 1203

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MARGUERITE LEVY, EXECUTRIX OF THE ESTATE OF WILLIAM LEVY, DECEASED, *Petitioner,*

*vs.*

NATIONAL BATTERY COMPANY, A CORPORATION, *Respondent.*

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## RESPONDENT'S BRIEF.

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The petition presents but one substantial determinative issue:

Did the Circuit Court of Appeals fail and refuse to be guided by Minnesota law with respect to the admissibility of Exhibits T and U in violation of Rule 43 (a) of the Federal Rules of Civil Procedure. (Specification of Errors, page 6.)

Rule 43 (a) permits admission of evidence in Federal Courts "which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held."

Respondent's position throughout this litigation has been, and still is, that Exhibits T and U are in themselves evi-

dences of a genuine compromise, and at the least, so identically related, that they partake of the same nature for purposes of determining the question of their admissibility. Consequently, they are universally inadmissible under the rules of evidence applied in the courts of the United States, Minnesota, and other jurisdictions.

Petitioner's chief grievance, however, is that the Minnesota rule, as expounded, mainly, if not solely, in the case of *Guile vs. Greenberg*, 192 Minn. 548, 257 N. W. 649, contrary to the decision of the Circuit Court of Appeals, "favored or failed to exclude" Exhibits T and U from admissibility. (Petitioner's Specification of Errors No. 3.)

With this position, respondent takes decided issue for the reasons hereinafter stated.

## I.

### Exhibits T and U Are Not Admissible Under Rule 43 (a) Because They Are Not Affirmatively Admissible Under Minnesota Law.

Rule 43 (a) compels admission of evidence, *inter alia*, only when such evidence "is admissible * * * under the rules of evidence * * *" applied in the courts of "* * * the state," *not* when such evidence is simply "favored" by the local rule or where the local rule "failed to exclude them from admissibility," as claimed by petitioner.

Hence, to indict the Circuit Court of Appeals of a violation of Minnesota law, it should be positively shown that it failed to admit evidence otherwise *affirmatively* admissible under the law of Minnesota. The word, "favored," as used by petitioner has no understandable legal significance here. Neither is it sufficient that the decision of the Minnesota courts "failed to exclude" the evidence. There is nothing in the federal decisions contrary to this view.

Petitioner's entire claim is based upon *absence*, and not

*positive existence*, of Minnesota law requiring admissibility of the evidence in question. Typical is the following statement made on page 13 of the petition.

> "There is no case in Minnesota which puts situations like the one here involved, to-wit, a payment in full of a liquidated claim, the amount of which is fixed by statute, within this exception to the general rule, even though, at the time of such payment in full, there is an express denial of liability, generally or on any specific ground."

The foregoing excerpt is cited for the reason stated, and reference thereto is not meant as an acquiescence in petitioner's view of the nature of the transaction represented by Exhibits T and U.

## II.

## Neither the Case of Guile vs. Greenberg, Nor Any Other Minnesota Decision Supports Petitioner's View.

Petitioner denies that the transaction represented by Exhibits T and U is a compromise and therefore to be safeguarded as such, but insists that

> "a payment in full of claims arising by virtue of the same accident was evidence of an admission by the appellant that Sullivan was acting within the course and scope of his employment at the time in question." (Petition, p. 8.)

She in effect concedes that if Exhibits T and U were evidences of a completed compromise, they would not be admissible because of the universally accepted reason, stated in 2 *Wigmore on Evidence*, 2nd Ed., Sec. 1061 (c), but takes the stand that they are not evidence of *compromise* but of *payment in full;* not a purchase of peace but a voluntary payment of everything claimed.

This is the nub of the issue. Respondent assumes that, if Exhibits T and U are not in the class of evidence which

represents "purchase of peace" and compromise, they are not entitled to the safeguard of exclusion. If, however, they belong properly in that class in accordance with Minnesota law, they are excludable. If the former is true, *we will assume, without conceding,* that the case of *Guile vs. Greenberg, supra,* renders them admissible as admissions against interest in substantiation of petitioner's claim as to the existence of a fact in issue. Beyond this, the Guile case has no bearing.

THE PAYMENT OF A CONTROVERTED CLAIM, IF MADE IN FACT AS A COMPROMISE, AND WITH EXPRESS DENIAL OF LIABILITY, *REGARDLESS OF THE AMOUNT PAID,* MUST BE TREATED AS SUCH.

This, at least in manifest effect, is the decision of the Circuit Court of Appeals. The federal cases upon which the holding, so far as the federal rule is concerned, rests, and which petitioner ineffectively seeks to brush aside as inapplicable, amply support it. So far as the Minnesota rule is concerned, petitioner, upon whom the burden lay, failed to cite a single decision to the contrary. It must be assumed that the Circuit Court of Appeals, lacking this, considered the Minnesota rule to be in harmony with the federal rule unless the case of *Guile vs. Greenberg,* so strongly relied upon by petitioner, contained something different. On the only material question, to-wit: whether the payment to Mrs. Sullivan was a compromise or not, the Guile case did not and does not shed a single iota of light. As a matter of fact, it is not in point, and the manner of its treatment by the opinion of the court below changes the situation not one bit.

That the Minnesota law is in complete accord with the federal rule enunciated by the court below regarding the effect of payment as compromise, is now settled beyond question by a recent Minnesota case, *Esser vs. Brophy,* ...Minn...., 3 N. W. (2d) 3, Opinion filed March 13, 1942. It was an

action for personal injury. Plaintiff called as her witness one Hambly whose automobile was also involved in the same accident. On cross examination, and over objection that it was a compromise, defendant was permitted to show that he had sued Hambly for $72 or $73 and that the witness paid $50 in settlement. Defendant was permitted to argue to the jury that the settlement was an admission by the witness that his negligence caused the accident. There was verdict for defendant. On appeal it was reversed.

After recognizing that "the question of whether or not the payment of like claims by persons sought to be charged, made to other parties, is proper evidence as an admission from conduct," had theretofore been left open, the court, through Peterson, J., reviewed the field of payment and compromise. It cited with approval *Hawthorne vs. Eckerson Co.* (2nd Cir.), 77 F. (2d) 844, relied upon by the Circuit Court of Appeals here, and other cases enunciating the same rule.

The real importance of the *Esser* case is probably contained in the following language:

> "Admissibility depends on whether an offer or payment was *intended as an admission of liability* or an effort to settle a dispute. 'As his (the party making the offer of compromise) object could not be a matter of law, and he knows what it was, he may testify directly on that point.' *Colburn vs. Groton*, 66 N. H. 151, 157, 28 Atl. 95, 98, 22 L. R. A. 763 * * *. Where, as here, there was no admission, but a compromise and settlement of a disputed claim, an inference of admission of liability is not permissible." (Italics supplied.)

This holding fully substantiates the position taken by respondent in its brief below on page 20. Therein it was stated as follows:

> "The cases and texts unqualifiedly apply the rule (of exclusion) once it is determined that the settlement is a compromise and not an express admission of liability.

> The important thing is that there be no admission of liability, express or implied. The *amount paid in settlement, whether substantial or inconsequential, and whether or not it is all that is claimed, is immaterial.*"

It is the payor's intention that controls. If he does not admit liability, that settles it and evidence of the payment is not admissible. Respondent, in Exhibits T and U, left no doubt as to its intention. Therein it is specifically stated that "it is the desire of the parties to peacefully settle and compromise their differences" (p. 75). In addition, respondent contended that the injury "did not arise out of or during the course of the employe's employment" (p. 74). We reiterate here the stand taken on page 21 in the brief below with respect to the dissenting opinion in the Hawthorne case on the question of intention.

> "Naturally, the reason behind the payment in such cases might be ambiguous. But where, as here, there is an express denial of liability, the intent is clear and the question no longer remains open. In such a case, the compromise is clearly inadmissible."

The tenuous nature of petitioner's position becomes more apparent when it is noted that she seeks to undermine the compromise and settlement status of the exhibits in question on the sole ground that the amount claimed was paid in full. This assumes that a compromise can be made only upon payment of something less than the full amount. This assumes that one cannot "purchase peace" by payment of the full amount. This view not only would disregard the express intention of the parties, the question of costs, the problem of vexatious and time-consuming litigation, which public policy ever seeks to avoid, but also would give a new and disastrous meaning to a "purchase of peace."

The real reasons for effecting a genuine compromise can conceivably differ in each case. The desire to get off with

payment of an amount less than that demanded, while certainly always a strong consideration, is not the only one. The courts have taken into account the others already indicated.

*Georgia Ry. and Electric Co. vs. Wallace and Company*, 122 Ga. 547, 50 S. E. 478.

*Hawthorne vs. Eckerson Company* (2nd Cir.), 77 F. (2d) 844, and others.

At least implicit in the latter case is the view that the amount paid, alone, is immaterial.

In the case at bar, there may be other considerations, not usually present, as an inducement to compromise by payment of the full amount. There could be the matter of the goodwill of the respondent's employees; the desire to soften the shock experienced by the widow of a faithful employee; and the matter of employee morale. These, as well as other inducing factors, could have been disclosed had it been necessary. However, the burden of proving the admissibility of the exhibits as not being evidence of compromise was upon petitioner. Respondent's express declaration of intention therein contained was sufficient to sustain its claim that they were inadmissible in the absence of a contrary showing by petitioner. No such showing was made.

It is urged that the decision of the Circuit Court of Appeals is correct and that the petition be denied.

Respectfully submitted,

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